

BRYNER WOOD

IBLA 80-639

Decided January 21, 1981

Appeal from decision of the Utah State Office, Bureau of Land Management, dismissing protest against consummation of State exchange. U-13925.

Affirmed as modified.

1. Federal Land Policy and Management Act of 1976: Exchanges-State Exchanges: Effect of Application

State exchange applications pending on Oct. 21, 1976, may be processed under sec. 8(c) of the Taylor Grazing Act, 43 U.S.C. § 315g(c) (1970), only if the state had complied with all the requirements necessary to vest rights to the exchange in the state; all other applications must be processed under sec. 206 of the Federal Land Policy and Management Act of 1976.

2. Federal Land Policy and Management Act of 1976: Exchanges--State Exchanges: Generally

A protest against approval of a state exchange application is properly dismissed.

where the exchange is shown to be in the public interest under sec. 206 of the Federal Land Policy and Management Act of 1976, and it is immaterial that the protestants may be permittees or licensees of the selected lands whose grazing privileges would have been lost upon completion of the exchange, in that neither a licensee nor a permittee has a vested right in the land covered by the license or permit and such land is available for selection by a state.

APPEARANCES: Bryner Wood, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Bryner Wood, hereinafter appellant, has appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), dismissing appellant's protest of a proposed state exchange.

On February 11, 1971, the State of Utah filed application U-13925, under section 8 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1272 (1934), as amended, 43 U.S.C. § 315g (1970), 43 CFR Part 2210, to exchange certain lands described therein. 1/ On February 29, 1980, appellant, through his attorney, filed a protest against the approval of the exchange stating:

1/ All sec. 17, and W 1/2 sec. 20, T. 35 S., R. 17 W., Salt Lake meridian, Utah, containing 960 acres; in exchange for offered lands described as: S 1/2 SE 1/4 sec. 9, S 1/2 SW 1/4 sec. 10, W 1/2 W 1/2 sec. 15, all sec. 16, and E 1/2 NE 1/4 sec. 21, T. 33 S., R. 18 W., Salt Lake meridian, Utah, containing 1,040 acres.

1. The Protestant is the owner of a Bureau of Land Management Grazing Permit granted by the Bureau of Land Management, which permit is of long standing, having previously been given to the Protestant's parents. The permit is currently active and in use and has been used actively for several years.

2. That the Protestant is dependent in part for his livelihood [sic] on the continued use of said grazing permit.

3. That the Protestant and his predecessors in interest have held and/or used said grazing permit for more than thirty years.

4. That it is unreasonable and unfair to terminate the Protestant's continued right to and use of said grazing permit.

By a decision dated March 25, 1980, BLM dismissed appellant's protest on the grounds that field reports showed that the subject lands were primarily valuable for occupancy or agriculture, and also, that the loss of the lands would not interfere with the administration or value of the remaining lands in the district for grazing purposes.

[1] Section 8(c) of the Taylor Grazing Act, as amended, 43 U.S.C. § 315g(c) (1970), provided that the Secretary of the Interior shall proceed with an exchange, once any state has applied for it, "at the earliest practicable date and * * * [shall] cooperate fully with the State to that end." It has been held that the terms of section 8(c) are mandatory and that the Secretary must allow a proper state's application if the state otherwise meets the requirements of that section. Donald L. Williams, A-29033 (Dec. 13, 1962); C O Bar Livestock Co., A-28498 (Sep. 18, 1961); L. P. Chastain, A-27101 (Apr. 27, 1955);

Joseph William Krall, A-27029 (Feb. 4, 1955); Clyde H. Ault, A-27125 (Jan. 26, 1955).

There were, however, certain requirements which a state was obligated to meet before its rights could be deemed to have vested. If, as here, the selected lands were in a grazing district, no exchange was authorized "unless the lands offered by the State in such exchange lie within such grazing district and the selected lands lie in a reasonably compact body which is so located as not to interfere with the administration or value of the remaining land in such district for grazing purposes." 43 U.S.C. § 315g(c) (1970). This, however, was not the only requirement. The regulations, specifically 43 CFR Subpart 2203, required, inter alia, that a state submit a properly executed deed of conveyance of the offered property, and certificates showing that the offered property had not been encumbered, executed by the proper state officer, and the recorder of deeds. It was only upon the completion of all of these steps that approval of the state exchange became ministerial.

Thus, in State of California, 60 I.D. 322 (1949), supplemented, 60 I.D. 428 (1950), Solicitor White expressly held that an exchange application which had been filed on February 19, 1942, was properly rejected on the basis of a reclamation withdrawal which did not occur until November 6, 1947, precisely because the State had not completed the application process. The deficiencies in that case were failure to publish notice of the application, failure to execute a deed of

conveyance of the offered property, and failure to provide certificates of nonencumbrance. The decision expressly noted that

as the State of California had not, prior to November 6, 1947, fully complied with all the requirements prescribed by section 8 of the Taylor Grazing Act, as amended, and the supplementary Departmental regulations, the State did not have on that date any vested rights in the selected lands, so as to prevent the withdrawal order of November 6, 1947, from being effective * * *."

Id. at 328.

The question of when the state's right to an exchange vests is of some real import, since section 705(a) of the Federal Land Policy and Management Act of 1976 (FLPMA) expressly repealed section 8(c) of the Taylor Grazing Act. In Junior L. Dennis, 40 IBLA 12 (1979), this Board held that the passage of FLPMA deprived the Department of authority to accept donations of land under the Act of July 14, 1960, 43 U.S.C. § 1364 (1970), which had also been repealed by FLPMA. In that case, two citizens who sought to donate land to the United States had signed and delivered a deed to the United States, which was duly recorded prior to the passage of FLPMA. Nevertheless, the Board, noting the repeal of the Act, held that a donation under the Act of July 14, 1960, supra, could only be consummated by a formal acceptance of the gift by the State Director, which had not occurred until June 28, 1978. The Board rejected the contention that the acceptance by the

State Director could relate back prior to the repeal of FLPMA, noting that

utilization of the legal fiction of relation back would be justified if either the Department had the authority, subsequent to the enactment of FLPMA, to accept donations of land under the Act of July 14, 1960, which it did not, or, alternatively, if the Department's actions were ministerial, which they were not.

Id. at 16. Inasmuch as it is clear that authority to allow state exchanges under section 8(c) of the Taylor Grazing Act did not survive FLPMA, the only possible way in which allowance under section 8(c) can be justified requires a finding that the actions of the Department in approving the same were ministerial.

The critical question, then, is whether the State's right to the exchange had vested as of October 21, 1976. The case file discloses that much of the field work was not completed until 1979, and that as of October 21, 1976, there had been no publication of the application, no deed of conveyance had been executed, and there had been no certificate of nonencumbrance provided. Thus, under State of California, supra, it is clear that the rights of the State had not vested as of the critical date and the application must therefore be processed under the aegis of section 206 of FLPMA. 2/

2/ We note that Organic Act Directive (OAD) 77-17 supports the processing of the instant application under section 8(c) of the Taylor Grazing Act. The rationale of that directive, however, is premised on a concept of relation back to the date of the application. Such a concept might have vitality when the sole remaining actions required are ministerial, but as noted above, rights to the State vest, and thus subsequent

Section 206 of FLPMA, unlike section 8(c) of the Taylor Grazing Act, does not require approval of all state exchanges. Under section 8(c) of the Taylor Grazing Act, supra, allowance of a state exchange was not dependent upon a determination by the Secretary of the Interior that the exchange was in the public interest. See Solicitor's Opinion, M-36178, 61 I.D. 270 (1954). Section 206 of FLPMA, on the other hand, clearly provides that an exchange may be approved "where the Secretary concerned determines that the public interest will be well served." See section 206(a) of FLPMA, 43 U.S.C. § 1716(a) (1976). Thus, under section 206, a finding that the exchange is in the public interest is a prerequisite of its allowance. The record is replete with evidence of the public benefits which would flow from this exchange. Indeed, the State Office made a finding that it would benefit the public interest, even though it felt that no such finding was required. We hold that the requirements of section 206 of FLPMA have clearly been met.

[2] One Robert Holt, a stranger to the record, disputes appellant's contention that he (appellant) is the owner of the grazing permit covering the selected lands which are the subject of this appeal.

fn. 2 (continued)

action becomes ministerial, only upon completion of various regulatory procedures which had not been accomplished herein. In any event, OAD's, while providing guidance to BLM on many matters, are binding neither on this Board nor on the general public. Cf. Milton D. Feinberg, 37 IBLA 39, 85 I.D. 380 (1978) sustained (On Reconsideration), 40 IBLA 222, 86 I.D. 234 (1979).

Regulations implementing section 206 were recently promulgated on January 6, 1981. See 46 FR 1634 (Jan. 6, 1981).

The dispute is of little moment since it has been previously determined that even where protestants held grazing licenses or permits from the BLM, this fact would not alter the situation since a licensee or permittee does not have a vested right in the land covered by the license or permit and such land is available for selection by a state. State of Utah, A-25710 (Jan. 30, 1950).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Utah State Office, Bureau of Land Management, is affirmed as modified and the case files are remanded for further action consistent with the views expressed herein.

L. Burski

Administrative Judge

James

We concur:

Bernard V. Parrette
Chief Administrative Judge

Anne Poindexter Lewis
Administrative Judge

